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SPECIFIC PERFORMANCE AT LAW. — A contract of purchase imposes a liability for the price conditional upon the receipt of the chattel; and even though the buyer by refusing to accept makes performance impossible, the vendor cannot recover the price.[1] Courts, to be sure, have held that a tender of performance is equivalent to performance,[2] but this can be true only for the purpose of grounding an action, not as a basis for computing damages.[3] The failure to make this distinction caused the court in Bement *v.* Smith[4] to allow the vendor to recover the price without delivery of the chattel. The title is regarded as in the vendee the moment the chattel is set aside for him. As this in effect allows specific performance at law, some courts limit it to those cases where the chattel is specially manufactured.[5] *Kinkead* v. *Lynch*, 132 Fed. Rep. 692 (Circ. Ct., Dist. of Nev.).

In either case there are three objections to allowing specific performance at law. First, consent, which is necessary for the transfer of title, is not obtained by mere appropriation to the buyer.[6] In fact the courts would not

[1] See opinion of Holmes, J., in White *v.* Solomon, 164 Mass. 516. The learned justice further adds that since payment was to be made upon delivery but before title passed, the plaintiff could recover the entire amount. (Field, C. J., Morton and Allen, JJ., dissented.) A recent North Carolina case makes the same distinction. National, etc., Co. *v.* Hill, 48 S. E. Rep. 637. The difficulty in such cases is that it is stretching the facts thus to interpret the contract.

[2] See Bement *v.* Smith, 15 Wend. (N. Y.) 493, and cases cited.

[3] See Shannon *v.* Comstock, 21 Wend. (N. Y.) 457, 460.

[4] *Supra.*

[5] See to the same effect, Ballentine *v.* Robinson, 46 Pa. St. 177.

[6] Salmond, Jurisprudence 376.

always hold that the title has passed, since a *bona fide* purchaser from the vendor would probably be protected.[7] This suggests the second objection. Since the vendor could thus cut off the vendee's interest, leaving him only an action at law which insolvency would render worthless, it is unjust to compel payment without more adequately securing his interest in the property. Lastly, it may be urged that the vendee, on default of the vendor, has no similar right to demand delivery of the manufactured article; and surely his right should not be inferior to the seller's. A court of law cannot order the vendor to transfer; nor can the vendee bring replevin.

These difficulties encountered by common law courts because of their procedure are overcome by allowing an action in equity should specific performance in such cases be advisable. This remedy obviates the first difficulty, since equity will force the defendant to take the title. Nor can the second objection be urged, since a court of equity will grant relief by compelling concurrent performance by the seller and the buyer.[8] Finally, the vendee by coming into equity could force the vendor to transfer the property and thus overcome the last objection.

The first two of these objections apply equally where rescission of an executed contract is allowed for breach of warranty. Moreover, there are objections to allowing this, even in equity. It has been urged that mercantile custom and justice demand such a remedy.[9] While admittedly goods are often returnable, it is only on the understanding that the vendee will receive goods of the proper kind in their place, for the vendor would hardly be willing that he return the goods absolutely, and thus escape a bad bargain. Under such circumstances there is an actual contract of rescission, which would seem to be the custom of merchants; but the rescission allowed by the Massachusetts courts would not permit the vendor to offer proper goods in exchange.[10] Again, it is urged that it is unjust of the vendor to insist upon his bargain when he has not furnished the proper goods,[11] but is it not more inequitable for the vendee to use this breach of warranty to avoid the consequences if the contract is unprofitable? It is not so unjust on the part of the vendor, since he is ready to respond in damages which adequately recompense the vendee.[12]

ADMIRALTY JURISDICTION OF TORTS. — The jurisdiction of the admiralty court in England as set forth in the ancient royal grants was sufficiently broad in scope to comprehend all maritime affairs.[1] But after a struggle against the jealousy of the common law courts, particularly in the sixteenth

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[7] For necessity of change of possession, see Williston, Cas. Bankruptcy 169, n. 1.

[8] See Langdell, Brief Survey of Equity Jurisdiction 46–47; 1 HARV. L. REV. 361, 362.

[9] Professor Williston in 16 HARV. L. REV. 465–475, where all the authorities are collected. See also articles by Professor Burdick and Professor Williston in 4 Columbia L. Rev. 1, 195, 265.

[10] This must follow. Since it has been decided that the buyer cannot also bring an action for damages, it would hardly be just to allow a seller in default an option to offer goods of the proper kind. See Professor Williston's Draft of Sales Law, sec. 54 (2). This is not the case where the contract is executory. 16 HARV. L. REV. 474, n. 1.

[11] 16 HARV. L. REV. 474.

[12] 16 HARV. L. REV. 475.

[1] Benedict, Admiralty Prac., 3d ed., § 110.